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U.S. Citizenship and Immigration Services

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[redacted]

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FILE: [redacted] Office: JACKSONVILLE, FL Date: APR 24 2008

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer in Charge, Jacksonville, Florida and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as the underlying waiver application is moot.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act for having been convicted of two crimes involving moral turpitude. The applicant is married to a U.S. citizen and has three U.S. citizen children. He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his family.

The record reflects that the applicant was convicted of battery and sentenced to six months probation on October 1, 1998. On April 6, 1999, he was convicted of battery and criminal mischief and fined. A third charge brought against the applicant for aggravated assault in 2000 was dismissed. *See Order of Probation, County Court of the Third Judicial Circuit, In and For Suwannee County, Florida*, dated October 1, 1998; *Misdemeanor Judgment and Sentence, County Court In and For Suwannee County, Florida*, dated April 6, 1999; *Notice of Termination of Deferred Prosecution, Circuit Court of the Third Judicial Circuit of Florida In and For Suwannee County, Florida*, dated October 18, 2000. In 2001, the applicant was convicted of providing false information to a law enforcement officer and placed on six months probation and fined.

The Officer in Charge found the applicant's convictions for battery to be crimes involving moral turpitude, and, therefore, concluded that he was inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act. She also found that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative were he to be removed from the Untied States and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Officer in Charge's Decision*, dated October 27, 2005.

On appeal, counsel asserts that the removal of the applicant from the United States would be a devastating occurrence for his entire family and that his spouse and children will be the ones to suffer for his previous actions. She also contends that the applicant has shown remorse and rehabilitation, and asks the denial of the Form I-601 be reconsidered. *Counsel's brief*, undated.

Section 212(a)(2)(A) of the Act states in pertinent part:

> (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
>
> > (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992):

> [M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general.
>
> In determining whether a crime involves moral turpitude, we consider whether the act is

> accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

It is the "inherent nature of the crime as defined by statute and interpreted by the courts and as limited and described by the record of conviction" and not the facts and circumstances of the particular person's case that determines whether the offense involves moral turpitude. See, e.g., *Matter of Short*, 20 I&N Dec. 136, 137 (BIA 1989); *Omagah v. Ashcroft*, 288 F.3d 254, 260 (5th Cir. 2002); *Goldeshtein v. INS*, 8 F.3d 645 (9th Cir. 1993). Neither the seriousness of the criminal offense nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude. *Matter of Serna*, 20 I&N Dec. 579, 581 (BIA 1992). Before one can be convicted of a crime of moral turpitude, the statute in question by its terms, must necessarily involve moral turpitude. *Matter of Esfandiary*, 16 I&N Dec. 659 (BIA 1979); *Matter of L-V-C*, 22 I&N Dec. 594, 603 (BIA 1999) (finding no moral turpitude where the "statutory provision . . . encompasses at least some violations that do not involve moral turpitude"). As a general rule, if a statute encompasses acts that both do and do not involve moral turpitude, deportability cannot be sustained. *Hernandez-Martinez v. Ashcroft*, 329 F3d 1117 (9th Cir. 2003), reh'g denied 343 F.3d 1075 (9th Cir. 2003). Although evil intent signifies a crime involving moral turpitude, willfulness in the commission of the crime does not, by itself, suggest that it involves moral turpitude. *Goldeshtein v. INS*, supra. Under the statute, evil intent must be explicit or implicit given the nature of the crime. *Gonzalez-Alvarado*, v. INS, 39 F.3d 245, 246 (9th Cir. 1994).

As a general rule, simple assault or battery is not deemed to involve moral turpitude for purposes of immigration law, even if the intentional infliction of physical injury is an element of the crime. *Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996). This general rule does not apply, however, where an assault or battery necessarily involves some aggravating dimension, such as the use of a deadly weapon or the infliction of serious injury on persons whom society views as deserving of special protection, such as children, domestic partners or peace officers. See, e.g., *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988).

The record demonstrates that the applicant was twice convicted of battery in Florida, in 1998 and 1999.[1] Under section 784.03 of the Florida Statutes in place in 1998 and 1999, battery was defined as:

> (1)(a) The offense of battery occurs when a person:
>
> 1. Actually and intentionally touches or strikes another person against the will of the other; or
> 2. Intentionally causes bodily harm to another person.

As previously noted, the federal courts and the Board of Immigration Appeals (BIA) rely on a categorical approach in interpreting criminal statutes, focusing solely on the elements and nature of the offense of conviction, rather than the particular facts relating to the applicant's crime. In the present case, the record indicates that the applicant was charged with battery, domestic violence in 1998 and aggravated battery, domestic violence in 1999. However, the record of conviction establishes that the battery charge on which he was twice convicted was that of simple battery. Although the AAO notes that a conviction under section 784.03 of the Florida Statutes in 1998 and 1999 required a willful infliction of harm, it did involve the

[1] Neither record of conviction indicates the specific statute under which the application was convicted. Each, however, reports that the applicant was convicted of "battery," the definition of which is provided by section 784.03 of the 1998 and 1999 Florida Statutes.

presence of any of the aggravating factors discussed in *Matter of Danesh,* e.g., the use of a weapon or the infliction of serious injury. Therefore, in light of controlling case law, the applicant's convictions for simple battery are not crimes involving moral turpitude and do not render him inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act.

The AAO notes that the applicant has been convicted of four separate offenses, two counts of battery, criminal mischief and providing false information to a law enforcement officer. Individuals who have been convicted of two or more crimes, regardless of whether they involve moral turpitude, are inadmissible to the United States under section 212(a)(2)(B) of the Act if the aggregate sentences for their offenses were for five or more years of confinement. In the present case, the applicant has never been sentenced to confinement as a result of his convictions. Accordingly, he is not inadmissible to the United States under section 212(a)(2)(B) of the Act on the basis of his multiple convictions.

As the applicant's convictions do not render him inadmissible to the United States under sections 212(a)(2)(A)(i)(I) or Section 212(a)(B) of the Act, he is not required to seek a waiver of inadmissibility. Accordingly, the decision of the officer in charge is withdrawn and the appeal is dismissed as the underlying waiver application is moot.

ORDER: The decision of the officer in charge is withdrawn. The appeal is dismissed as the underlying waiver application is moot.